U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 15May2001

Case No.: 2000-LHC-1651

OWCP No.: 5-107645

In the Matter of:

RICHARD NUNNALLY,
Claimant,

v.

VIRGINIA INTERNATIONAL TERMINALS,
Employer.

Appearances:

Gregory E. Camden, Esq.
For Claimant

R. John Barrett, Esq.
For Employer

Before: DANIEL A. SARNO, JR.
Administrative Law Judge

DECISION AND ORDER

This proceeding arises from a claim under the Longshore and Harbor Workers' Compensation Act ("the Act"), as amended, 33 U.S.C. §§ 901 *et seq*.

A formal hearing was held in this case on November 30, 2000, in Newport News, Virginia. Mr. Nunnally (hereinafter, Claimant) offered exhibits CX 1 through CX 7[1] and Virginia International Terminals (hereinafter, Employer) offered exhibits EX 1 through EX 6.[2] The exhibits were admitted into evidence

[1]Claimant's Exhibit 7 was submitted as a supplement to CX 6, without objection, post-hearing.

[2]All of Employer's exhibits, except for EX 4, are duplicates of Claimant's exhibits. Therefore, in the interest of simplicity, the court cites to Claimant's exhibits.

without objection.[3] Both parties submitted post-hearing briefs. The findings and conclusions which follow are based on a complete review of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations, and pertinent precedent.

STIPULATIONS

Employer and Claimant stipulated to, and the court finds, the following facts:

1. That an employer/employee relationship existed at all relevant times;

2. That the parties are subject to the jurisdiction of the Act;

3. That Claimant alleges binaural hearing loss with a date of diagnosis of November 3, 1999;

4. That timely notice of injury was given by Claimant to Employer;

5. That a timely claim for compensation was filed by Claimant;

6. That Claimant's average weekly wage at the time of the injury was $1,586.90, which resulted in entitlement to benefits at the maximum compensation rate at the time of his injury which was $901.23 per week;

7. That employment records show that Claimant was employed by Employer on 10/27/99; 10/28/99; 10/29/99; 11/1/99 and 11/2/99;

8. That during the time period from October 27, 1999 to November 2, 1999, Claimant did not work for any other employer;

9. That Claimant did not work for Employer on 11/3/99, but rather worked for a different employer after the audiogram was performed on 11/3/99;

10. That the parties agree that both the audiogram dated 11/3/99 from Dr. Queen and the audiogram dated 5/19/00 from Dr. Hecker meet the requirements of 33 U.S.C. Section 9(c)(13) and 20 CFR Section 702.44 (b)(1)-(3) and (d).

ISSUE

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[3]The following abbreviations will be used as citations to the record:

CX - Claimant's Exhibit
EX - Employer's Exhibit
ALJX - Administrative Law Judge Exhibit
TR - Transcript

Whether Claimant is entitled to benefits for hearing loss due to work-related noise exposure?

FINDINGS OF FACT

1. Employer has employed Claimant for eighteen years as a checker at the Newport News Marine Terminal ("NNMT"). TR 11-12, 34. As a checker, Claimant is responsible for entering each container's number into a hand-held computer as containers are loaded or unloaded from ships in port. TR 12, 24.

2. Containers are large, steel boxes in which cargo is stored. TR 12. They are typically 20 to 40 feet long, eight feet wide, and 8'6" to 9'6" tall. TR 13. When empty, a 40 foot container weighs four tons. TR 13. When loaded to capacity, it weighs more than 30 tons. TR 13.

3. Claimant explained that containers are placed on the "blacktop"[4] while in transit to and from cargo ships. TR 13. Containers are transported to the blacktop by "hustlers," which resemble tractor trailers. TR 14, 29. A "stacker" or "transtainer[5]" then deposits containers in stacks onto the blacktop. TR 14, 29. Stacks are usually three to four containers high. TR 15.

4. Claimant described the equipment used to stack the containers, including the transtainers, top loaders, and stackers as "extremely noisy. . . especially the transtainer." TR 20. Claimant explained that most of the noise comes from diesel engines on the machines. TR 21. He described the sound of the containers being stacked as similar to metal striking metal. TR 15.

5. While checking containers, Claimant usually sits inside of a company pickup truck with the windows open.[6] TR 22. He is four to six feet away from the transtainers and stackers, while the containers are stacked approximately 15 feet away. TR 22. The diesel engines are about 30 feet from Claimant. TR 23.

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[4]The blacktop is a temporary storage and holding area located approximately 300 yards from the piers. TR 14, 17, 27.

[5]Stackers and transtainers are similar to cranes. TR 18. However, transtainers are confined to a specific area, such as a single concrete pad located inside or next to the blacktop. TR 21. The transtainer is confined to the concrete pad, but runs from one end to the other end of the pad. TR 21.

[6]Claimant explained that the truck windows must be open so that other workers can communicate with him. TR 24.

6. On average, Claimant checks one hundred containers per day, one right after the other. TR 23, 24. As a result, a transtainer or stacker comes up next to his truck approximately one hundred times per day to pick up or drop off a container. TR 23. Hustlers also pull up right beside Claimant. TR 25. Additionally, other transtainers and equipment are continuously operated around Claimant.[7] TR 23. On occasion, Claimant is required to walk around the transtainer or stacker, directly past its diesel engine, so that he can clearly see a container's number. TR 25.

7. A maximum of five ships[8] can be docked on the pier for servicing at any given time. TR 27. On average, there are three ships docked per day. TR 27. Claimant stated that the typical workday is from eight a.m. to five p.m., but that he must stay with a ship until it is completely finished. TR 35-6.

8. Claimant's work history shows that he occasionally worked shifts as long as 16 hours for Employer. CX 3-1-10. Additionally, Claimant worked overtime hours in increments of nine to 17 hours at a time. CX 3-1-10.

9. Claimant stated that his job has not changed, but that it seems louder than in the past. TR 35. He explained that the increase in noise is due to the replacement of old equipment with new, louder equipment. TR 37-8.

10. Claimant testified that he has had a hearing problem for about two years. TR 34. His right ear is worse than his left ear. TR 34. Claimant admitted that he does not use ear protection, nor is ear protection required. TR 36.

11. Claimant stated that he has diabetes, for which he takes insulin. TR 33. He also stated that while he was in the Army, he was trained to use M-14's. TR 34. He did not use ear protection when firing the M-14's. TR 37.

12. Mr. Thomas Bragg is an acoustical consultant. TR 39, 41. As a consultant, he has studied and measured noise levels at various ports throughout the nation. TR 41-2, CX 6-9.

13. In the summer of 2000, Bragg conducted a noise survey of the Portsmouth Marine ("PMT"), Norfolk International ("NIT") and Newport News Marine ("NNMT") Terminals to determine whether the ports comply with the noise provisions of the Occupational, Safety and Health Act ("OSHA"). TR 43, CX 6-15.

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[7]Claimant testified that three to four transtainers and stackers constantly operate around him, about three to four feet apart. TR 24, 33.

[8]Two ships can be docked on each side of the pier, with one ship "on the face" of the pier. TR 27.

14. Bragg explained that, in accordance with the OSHA regulations, noise exposure is permitted up to 85 dBA[9] for 16 hours, 90 dBA for eight hours, 95 dBA for four hours, 100 dBA for two hours, etc. TR 45, 63, CX 6-33. As a result, the amount of allowable decibels must be adjusted if an employee works longer than 8 hours. TR 66. For example, an employee can work over an hour longer at 89 dBA than at 90 dBA. TR 69. Levels below 80 dBA are not included in the OSHA calculations because the regulations allow infinite exposure below 80 dBA. TR 64. Additionally, the OSHA regulations do not allow impulse noises[10] above 140 dB during any work shift. TR 77, CX 6-26.

15. The accepted margin of error for decibel measurements is 2 dB. CX 6-77.

16. To complete his survey, Bragg measured the average noise exposure for categories of jobs and their tasks. CX 6-23. For each individual job category, Bragg used an instrument that takes eight sample sound readings per second. TR 48, CX 6-38. In order to insure accuracy, the instrument's microphone was protected from wind noise by a wind screen.[11] TR 49, CX 6-89. The instrument was calibrated prior to, during, and after each shift to ensure accuracy.[12] TR 49, CX 6-62. If the calibrations change more than half a dB, then the measurements are not counted. TR 50, CX 6-62, CX 6-136. Additionally, the sound level meter is calibrated in a laboratory according to the manufacturer's specifications once a year. TR 50.

17. Bragg tested the NNMT facility during the daytime, on the first shift (8 a.m. to 5 p.m.). TR 75. He explained that the daytime is typically louder because there is more ambient noise, such as distant traffic. TR 75. As a result, Bragg asserted that daytime measurements are the most accurate. TR 75.

18. Bragg spent a total of 32 hours over four eight-hour work shifts at NNMT. TR 44, CX 6-44. Of the 32 hours spent at NNMT, 12 hours were during the weekend. TR 94. He spent

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[9]A dBA is an A-weighted decibel. CX 6-19-20. A-weighted means that the lower frequency levels have been filtered out because high frequency levels are more harmful to hearing. CX 6-19. For example, a measurement of 65 dBA represents that the average of the areas tested is 65 decibels, after filtering out low frequencies. CX 6-21.

[10]An impulse noise is an instantaneous noise that lasts one second or less. TR 88, CX 6-26. Examples of impulse noises are the "kaboom" of a container being dropped, or a gunshot. TR 88, CX 6-27.

[11]Other types of inclement weather do not affect the instrument's readings. CX 6-88-90.

[12]Bragg's instrument was properly calibrated at the time of the exposure testing. CX 6-134-135.

approximately an hour and a half testing each of the 25 types of jobs available at the facility, with about four hours dedicated to checkers. TR 93, 74. For each checker studied, Bragg spent four to seven cycles[13] of work with the checker. TR 87, CX 6-39. Each cycle can last as long as ten minutes. TR 88, CX 6-39. Bragg agreed that Claimant worked an average of 100 similar cycles per day. TR 51.

19. Bragg determined which functions the checkers performed by inquiring of management what job tasks the checkers complete. TR 53, CX 6-29-30. All of Bragg's information concerning employee tasks and the lengths of these tasks came solely from management. TR 98. He did not ask the checkers any questions related to their jobs, nor did he engage in conversations with them while testing the sound levels. TR 76, 98, CX 6-30-31. He testified that on the few occasions when he spoke to checkers, he did so in a normal conversational tone. TR 76.

20. Bragg's survey at NNMT measured two areas where checkers work. The first area, "Department Marine," is located on the piers near the ships, and the second area is the "Container Field," or blacktop. TR 53. Within each area, Bragg studied five types of noise exposure; Personal Breaks, Dock Under Crane, Dock Under Crane With Bell, Dock Pickup Truck Standby, and Terminal General Truck Travel. TR 53.

21. To measure the sound levels to which NNMT's checkers are exposed, Bragg either sat in the pickup truck with the checker, or placed the microphone through the checker's window. TR 51-2. The microphone was placed between one and three feet from the checker's ear. TR 52, CX 6-106.

22. Bragg noted that workers are allowed one hour and twenty minutes of break time per day. TR 53, CX 6-18. He calculated the total amount of noise exposure to correspond to an eight-hour work shift, and adjusted individual exposure times accordingly. CX 6-32. After recording the numbers for each exposure area, Bragg took the average of the numbers as the dBA level. TR 54. Within the container field, Bragg found that the noise level was consistently below 80 dBA.[14] TR 71. Therefore, Employer was not required to take action under the OSHA regulations. TR 71.

23. Bragg did not maintain records of high and low readings. TR 76, CX 6-21. Instead, he recorded the average noise levels. TR 76, CX 6-22, CX 6-38. Bragg's recording instrument

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[13]Bragg explained that when measuring specific job tasks, he measures cycles of work. TR 51. An example of a checker's "cycle" begins when a hustler pulls a container off of a ship, transports the container to the crane, the crane picks up the container and stacks it on the blacktop, the hustler pulls away, and another hustler pulls up with a second container. TR 51, CX 6-38-39.

[14]However, the court notes that according to Bragg's report, the average noise exposure amount from the toploader was 89 dBA. CX 7.

also measured impulse noises above 120 dB. TR 77, CX 6-23. No peaks above 120 were recorded for the checker position. TR 77-8.

24. Bragg testified that Claimant received, on average, one hundred seconds of impulse noise per day. TR 90. He stated that the impulses were not over 120 dB. TR 91. Additionally, because the total noise exposure was a low average, Bragg noted that the impulses to which checkers are exposed could not be very loud. TR 91. However, Bragg admitted that "high enough impulses repeated often enough certainly can cause hearing damage." TR 90.

25. Bragg admitted that the OSHA regulations do not indicate that a man exposed to 90 dBA for eight hours will not suffer hearing damage. TR 45-6. Bragg also admitted that his test is based solely on OSHA standards, and that if a different standard is used, the test is not relevant. CX 6-132.

26. Bragg testified that as much as 25% of the population would still suffer noise induced hearing loss at levels below 90 decibels. TR 82. Bragg also testified that he can not guarantee that an individual exposed to lower levels of noise than those required by OSHA would not suffer noise-induced hearing loss. CX 6-11-12.

27. Bragg asserted that the study is accurate three to five years retroactively, and three years prospectively, assuming that the equipment is the same, and no other factors have changed. TR 79, CX 6-49, CX 6-97-99.

28. Dr. Timothy Queen has practiced in Virginia since 1995. CX 4-5. Dr. Queen is an ear, nose and throat doctor, and Claimant's treating physician. CX 2, CX 4. He specializes in the "medical aspects of hearing loss," its potential causes, and its treatment. CX 4-8. However, Dr. Queen does not possess expertise in evaluating environmental noise problems. CX 4-8.

29. Dr. Queen explained that certain aspects of a hearing exam may indicate the type of hearing loss a patient has experienced. CX 4-14-15. For example, a notching pattern at four to six thousand hertz is consistent with noise exposure. CX 4-15. Dr. Queen also notes that noise-induced hearing loss is usually bilaterally symmetric. CX 4-17. In Claimant's case, Dr. Queen observed that Claimant's hearing loss is "fairly close to being symmetric except for in the ultra-high frequency, there's a slight asymmetry between the two ears."[15] CX 4-17. However, Dr. Queen also explained that asymmetry does not necessarily exclude noise exposure as the cause of hearing loss. CX 4-18.

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[15]Dr. Queen's equipment was certified as calibrated on the date Claimant's hearing was tested. CX 4-35.

30. Dr. Queen testified that another indicator of noise-induced hearing loss is little to no evidence of an air-bone gap. CX 4-19. He explained that Claimant's air-bone gaps of 11 and 12 are borderline normal findings for noise-induced hearing loss. CX 4-19.

31. Dr. Queen testified that noise-induced temporary hearing loss can improve over time. CX 4-13. In order to prevent a false audiogram reading which indicates temporary hearing loss, Dr. Queen recommends that a patient not be exposed to loud noises within one to two days immediately prior to examination. CX 4-13. In Claimant's case, Dr. Queen noted that a second audiogram performed on May 19, 2000 was consistent with Dr. Queen's audiogram of November 3, 1999, indicating that Claimant's hearing loss was not temporary. CX 4-13-14.

32. Claimant reported use of three drugs used to control his diabetes. CX 4-28. Dr. Queen opined that none of the drugs were ototoxic.[16] CX 4-28.

33. Dr. Queen admitted that diabetes is a fairly common cause of hearing loss. CX 4-25. He explained that diabetes-induced hearing loss is sensori-neural, as is noise-induced hearing loss. CX 4-26. It is also typically bilateral. CX 4-26. However, Dr. Queen testified that diabetes-induced hearing loss tends to affect all frequencies, not exclusively the high frequencies as does noise-induced hearing loss. CX 2-9, CX4-26. Dr. Queen described Claimant's hearing loss solely at high frequencies in both ears as a classic example of noise-induced hearing loss. CX 2-9. Therefore, Dr. Queen opined that Claimant's hearing loss is not related to his diabetes. CX 2-9.

34. Dr. Queen also considered Claimant's working conditions when categorizing Claimant's hearing loss as noise-induced. For example, Dr. Queen noted that sitting in a truck with the windows open would not provide hearing protection. CX 4-38. However, sitting in a truck with the windows closed may provide some protection, although clearly not enough. CX 4-38.

35. Dr. Queen recommended that Claimant use hearing protection, have hearing exams every one to two years, and use hearing aids. CX 2-7, CX 4-35. He testified that hearing aids vary in price from $600 to over $3000. CX 4-36.

36. Dr. Henry Hecker, an audiologist, examined Claimant for a second opinion. CX 1-1. Dr. Hecker reported that Claimant had a history of exposure to various machinery noises without ear protection as a longshoreman. CX 1-1. Claimant reported tinnitus and feelings of being "off-balance" to Dr. Hecker. CX 1-1.

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[16] According to Dorland's Medical Dictionary, ototoxic means "having a deleterious effect upon the eighth nerve, or upon the organs of hearing and balance." *Dorland's Medical Dictionary*, 28th Edition.

37. Dr. Hecker explained that Claimant's tests exhibited a bilateral, moderate to moderately severe, sensorineural hearing loss in the frequencies beyond 2,000 hertz. CX 1-1.[17] He demonstrated a 92% speech understanding in a quiet environment, which decreased to a 56% level of understanding in environments with background noise. CX 1-1.

38. Dr. Hecker described Claimant's audiogram as typical of a patient with a history of noise exposure. CX 5-19. He explained that the pattern for noise induced hearing loss is symmetric and bilateral. CX 5-20. He testified that Claimant has the clear-cut, bilateral, symmetrical, high frequency hearing loss pattern typical for noise induced hearing loss. CX 5-49. As a result, Dr. Hecker opined that Claimant suffers bilateral sensorineural hearing loss consistent with noise exposure on the job. CX 1-1, CX 5-22.

39. Dr. Hecker determined that diabetes is not the cause of Claimant's hearing loss, although he admits that Claimant's diabetes may have caused his hearing loss to worsen. CX 5-36, 37. Dr. Hecker also considered that Claimant's hearing loss may be due to age. He explained that noise induced hearing loss shows a pattern similar to hearing loss due to age. CX 5-31. However, he noted that noise induced hearing loss is greatly accelerated compared to hearing loss due to age. CX 5-31. Additionally, noise induced hearing loss exhibits a dramatic drop around 3,000 to 4,000 hertz. CX 5-31-32.

40. Dr. Hecker explained that most noise induced hearing losses are sensory nerve hearing losses and are permanent in nature. CX 5-12. However, Dr. Hecker admitted that exposure to noise prior to a hearing test, such as during the morning of an afternoon test, can cause a hearing loss to appear more dramatic than it is. CX 5-32. Additionally, he testified that noise induced hearing loss may improve slightly over time if the individual is removed from the noisy environment. CX 5-33.

41. Based on his findings, Dr. Hecker determined that Claimant's hearing loss in his right ear was borderline for compensability, but that his hearing loss in his left ear was not compensable. CX 5-35.

42. Dr. Hecker testified that he rarely uses OSHA standards to determine if a hearing loss is noise induced. CX 5-13-14. Dr. Hecker explained that it is possible to suffer noise-induced hearing loss at levels lower than 85 dBs. CX 5-18. He noted that if an individual already has damage to his ears, he will be more susceptible to further damage at lower noise levels. CX 5-25. He also noted that a damaged ear has an abnormal perception to an increase in loudness, so that a damaged ear cannot tolerate loudness as easily as a normal ear. CX 5-25-26.

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[17]Dr. Hecker's equipment was properly calibrated on the date of Claimant's testing. CX 5-10.

43. Dr. Hecker also pointed out that in Claimant's case, there was no base-line audiogram to determine his hearing loss prior to noise exposure. CX 5-17. He noted that exposure during employment, and machinery used at Employer's facility, could have changed within the twenty-four years Claimant was employed by Employer, thus affecting Claimant's hearing. CX 5-17.

44. Dr. Hecker testified that sitting in a truck with the windows down was "just like being" directly exposed to the noise. CX 5-37.

45. Dr. Hecker recommended that Claimant have annual hearing exams, mandatory ear protection with noise levels greater than 85 dB, regardless of the amount of time exposed, and hearing aids for the duration of his life. CX 1-1. He suggested that Claimant wear earmuffs rather than ear plugs as protection from noise. CX 5-40.

46. Dr. Hecker explained that Claimant's hearing loss requires hearing aids that amplify his hearing only in the high frequency ranges. CX 5-42. He estimates that the hearing aids will cost between $1,500 to $1,800[18] per hearing aid. CX 5-43. The average life expectancy of the hearing aids is five years, unless Claimant's hearing changes. CX 5-43. Batteries for the hearing aids cost approximately $1.25 to $1.50 per battery. CX 5-45. The batteries last between three and four weeks, for a total of fifteen to twenty batteries per hearing aid per year. CX 5-45.

47. Dr. Hecker explained that there is a five point differential between audiograms, meaning that on any given day, with the same equipment, there may be a 5 dB difference in audiograms. CX 5-49. He noted that Dr. Queen's audiogram showed a hearing loss in the low frequencies. CX 5-49-50. He explained that other than the low frequency loss indicated by Dr. Queen's audiogram, the two audiograms are consistently within the 5 dB point differential. CX 5-50. Dr. Hecker opined that the low frequency loss Dr. Queen indicated is attributable to Dr. Queen's testing environment. CX 5-50.

CONCLUSIONS OF LAW

Section 20(a) of the Act raises a presumption that, in the absence of substantial evidence to the contrary, a claim for benefits comes within the provisions of the Act, i.e., that the injury was work-related. *Sprague v. Director, OWCP*, 688 F.2d 862 (1st Cir. 1982), s*ee also Woodside v. Bethlehem Steel Corp.*, 14 BRBS 601 (1982). Once the presumption is invoked, the burden shifts to the employer to present specific evidence to rebut the presumption. *See Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976); *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966). Employer's evidence must sever the potential connection between the disability and the work environment. *Hensley v. Washington Metro. Area Transit*

[18]Dr. Hecker noted that Claimant's union benefit of $700 is inadequate for the cost of the hearing aids Claimant requires. CX 5-44.

Authority, 655 F.2d 264, 13 BRBS 182 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 904 (1982), *rev'g* 11 BRBS 468 (1979); *Webb v. Corson & Gruman*, 14 BRBS 444, 447 (1981). If the presumption is overcome by the introduction of substantial evidence, the fact finder must evaluate all of the evidence and reach a decision based on the record as a whole. *Del Vecchio v. Bowers*, 296 U.S. 280 (1935); *Swinton*, 554 F.2d 1075, 4 BRBS 466; *Glover v. Aerojet-General Shipyard*, 6 BRBS 559 (1977); *Norat v. Universal Terminal & Stevedoring Corp.*, 3 BRBS 151 (1976).

Under Section 8(c)(13)(C), an audiogram is presumptive evidence of the amount of hearing loss only if: (1) the audiogram is administered by a qualified professional, (2) the audiogram with report is provided to the employee at the time of the test, and (3) no contrary audiogram is produced. 33 U.S.C. § 908(c)(13)(C). In this case, Claimant submitted two audiograms as evidence of his hearing loss. The audiogram performed by Dr. Queen demonstrated a binaural symmetrical hearing loss, representing a 2.5% impairment under the AMA Guides. CX 5-35. Dr. Hecker's audiogram demonstrated binaural symmetrical hearing loss that was just below the compensable limit as defined by the AMA Guides. CX 5-35. While it is clear that both Dr. Queen and Dr. Hecker are qualified professionals, there is no evidence that Claimant was presented with a report of the audiograms at the time of the tests. Additionally, because there is a slight difference between the two audiograms, they are contradictory. As a result, the court may not count either audiogram as presumptive evidence of hearing loss.

However, the court does find the audiograms, coupled with Drs. Queen and Hecker's testimonies, sufficient evidence that Claimant suffered a harm, i.e. hearing loss. Both Dr. Queen and Dr. Hecker opined that Claimant suffers from noise induced hearing loss. Both doctors recommended that Claimant receive annual hearing exams, use mandatory ear protection, and use hearing aids for the remainder of his life. Therefore, the court finds that there is sufficient evidence that Claimant sustained a harm.

After considering the evidence of the two audiograms and the opinions of Drs. Queen and Hecker, the court finds that Dr. Queen's opinion and audiogram represent the most accurate picture of Claimant's hearing loss because Dr. Queen is a licensed medical doctor[19] as well as Claimant's treating physician. CX 4-4, CX 2, CX 4. On the other hand, Dr. Hecker, although a thoroughly qualified audiologist, is not a licensed medical physician. CX 5-4, 5. Additionally, Dr. Hecker's audiogram was administered merely as a second opinion. CX 1-1. Finally, after taking into account the 5 dB differential, the court notes that the two audiograms are consistent in that they both indicate noise-induced hearing loss in the high frequency range. CX 5-50. As a result, the court finds that Dr. Queen's opinion is entitled to greater weight. Therefore, the court finds that Claimant has established a 2.5% binaural hearing loss.

To benefit from the 20(a) presumption, Claimant must also establish that working conditions existed which could have caused the harm. *Murphy v. SCA/Shayne Bros.*, 7 BRBS 309 (1977), *aff'd mem.*, 600 F.2d 280 (D.C. Cir. 1979); *Kelaita v. Triple A Mach. Shop*, 13 BRBS 326 (1981). If

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[19]Although Dr. Hecker is a doctor of audiology (Au.D.), he is not a medical physician. CX 1, CX 5.

there is medical evidence that the claimant has suffered noise induced hearing loss and the claimant testifies that he works around loud machinery, the claimant's burden is met. *Damiano v. Global Term. & Container Serv.*, 32 BRBS 261 (1998). To establish that his working conditions could have caused his hearing loss, Claimant credibly testified that his work environment is extremely noisy. He testified that containers weighing between four and thirty tons are repeatedly stacked onto one another, or dropped onto the blacktop about fifteen feet from Claimant. TR 13-14, 22. He described the sound of the containers being stacked as metal striking metal. TR 15. Additionally, Claimant explained that noisy machinery, powered by diesel engines, constantly surrounds him. TR 24, 33. Occasionally, Claimant's job requires him to walk around a machine, directly past the diesel engine. TR 25. Yet, despite the substantial amount of noise that Claimant encounters on the job, he is not required to use ear protection. TR 36. Claimant has therefore presented sufficient evidence that working conditions existed which could have caused his hearing loss. The court finds that Claimant has successfully invoked the Section 20(a) presumption.

The burden now shifts to Employer to rebut the presumption with substantial countervailing evidence. *Swinton,* 554 F.2d 1075, 1082; 4 BRBS 466, 475 (D.C. Cir), *cert. denied*, 429 U.S. 820 (1976). Employer presents Claimant's testimony that he was trained to use M-14's, without the use of ear protection, to rebut the presumption that Claimant suffers from work-related hearing loss. TR 34, 37. However, the Benefits Review Board has held that mere hypothetical probabilities are insufficient to rebut the Section 20(a) presumption. *Smith v. Sealand Term.,* 14 BRBS 844, 846 (1982). The presumption may not be rebutted merely by suggesting an alternate theory of causation. *Williams v. Chevron, U.S.A.*, 12 BRBS 95, 98 (1980). Employer has not presented specific and comprehensive evidence that establishes Claimant's hearing loss occurred solely because he was trained to fire weaponry without ear protection. The court finds this evidence insufficient to rebut the Section 20(a) presumption.

Employer also offers the testimony of Mr. Bragg to rebut the presumption that Claimant suffers from noise induced hearing loss. Mr. Bragg determined that Claimant's position as a checker did not violate the noise exposure standards mandated by OSHA. TR 71, 77-8. However, the court finds Mr. Bragg's study irrelevant for the purpose of determining whether Claimant's hearing loss is work related. Bragg spent approximately four hours studying noise exposure to checkers at NNMT. TR 74. However, the four hour window of time during which Bragg tested noise levels at NNMT can not account for the eighteen years of noise exposure Claimant has suffered while employed by Employer. TR 11-12, 34. Bragg himself asserted that his study is accurate only for three to five years retroactively, and three years prospectively, assuming that equipment and other factors do not change. TR 79, CX 6-49, CX 6-97-99.

Additionally, Bragg admitted that compliance with the OSHA regulations, which his survey is meant to demonstrate, will not protect a worker from hearing loss. TR 45-6; *see also Damaiano v. Global Term. & Container Serv.,* 32 BRBS 261 (1998) (compliance with OSHA noise exposure standards constitutes relevant, but not determinative evidence). He testified that as much as 25% of the population develops noise induced hearing loss after exposure to noise at the levels approved by OSHA. TR 82. Finally, the court notes that although Bragg's study of noise exposure for checkers was

within the limits imposed by OSHA in the summer of 2000, noise exposure varies over time as factors such as the use of the port, the amount of machinery operated, the type and condition of machinery operated, and individual job tasks change.

Employer also asserts that Claimant's hearing loss can not be work related because Dr. Queen's examination of Claimant revealed an airbone gap and low frequency hearing loss. CX 4-19, CX 5-49, 50. Contrary to Employer's position, the court notes that Dr. Queen described Claimant's airbone gap as borderline normal, meaning that Claimant's airbone gap is within the normal range. CX 4-19. Additionally, although Dr. Queen's audiogram demonstrates minimal evidence of low frequency hearing loss, the mere existence of low frequency hearing loss is not sufficient to rebut the presumption that Claimant's high frequency hearing loss is work-related. CX 5-50. It is entirely plausible that Claimant suffers from both high and low frequency hearing loss. The fact that Claimant suffers from low frequency hearing loss, which is typically not noise induced, merely means that Employer may not be liable for that loss if the low frequency hearing loss is not work-related. CX 2-9, CX 4–26, CX 5-49. The existence of low frequency hearing loss, by itself, does not disprove that Claimant suffers from noise induced hearing loss.

Finally, Employer argues that evidence of Claimant's age, diabetes and asymmetrical hearing loss successfully rebuts the presumption.[20] However, both Drs. Queen and Hecker clearly opined that Claimant's hearing loss is not related to either diabetes or age. CX 2-9, CX 5-36, 37, CX 5-31, 32. Dr. Queen testified that if Claimant's hearing loss was related to diabetes, there would be evidence of hearing loss throughout all frequencies, as opposed to a high concentration of hearing loss in the higher frequencies, and minimal hearing loss in some of the low frequencies.[21] CX 2-9, CX 4-26. Dr. Hecker explained that Claimant's hearing loss was greatly accelerated as compared to age-related hearing loss. CX 5-31. Additionally, Dr. Queen testified that the slight asymmetry in Claimant's hearing between the left and right ears is not necessarily indicative that his hearing loss is not work-related. CX 4-18. In fact, after considering the very slight difference in Claimant's right and left ears, Dr. Queen clearly opined that Claimant's hearing loss is noise induced, and Dr. Hecker agreed. CX 2-9, CX 1-1, CX 5-22, CX 5-49. Finally, the court once again points out that Employer may not merely suggest alternate theories to rebut the presumption. *Williams,* 12 BRBS 95, 98 (1980). It is Employer's burden to rebut the presumption with specific and comprehensive evidence. *Swinton,* 554 F.2d 1075, (D.C. Cir.), *cert. denied,* 429 U.S. 820 (1976). Even considering all of Employer's arguments as a whole, the

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[20]The court notes that, in this case, even if diabetes and age played a role in Claimant's hearing loss, he would still be entitled to benefits under the Act under the aggravation theory. *Morehead Marine Serv., Inc., v. Washnock,* 32 BRBS 8 (CRT) (6th Cir. 1997).

[21]Dr. Queen testified that he did not feel Claimant's test results were reliable in the ultra-low frequencies. He explained that Claimant's positive results for hearing loss around the 125-250 hertz range were most likely false, because it is difficult to accurately test the ultra-low frequencies. CX 4-31. Dr. Queen is particularly sure of the low range inaccuracy in Claimant's reading since the audiogram performed by Dr. Hecker shortly thereafter did not demonstrate low frequency hearing loss. CX 4-31.

court finds that Employer failed to present substantial countervailing evidence sufficient to sever the connection between Claimant's injury and his work environment. As a result, the court finds that Claimant has demonstrated a 2.5% binaural hearing loss under the AMA Guides caused, at least in part, by exposure to noise at work.

In accordance with Section 8(c)(13)(B), Claimant is entitled to permanent partial disability benefits on the basis of his binaural hearing loss at the stipulated compensation rate of $901.23 per week for 5 weeks (2.5% hearing loss X 200 weeks) for a compensation award of $4,506.15. Claimant is also entitled to medical benefits in accordance with Section 7 of the Act, including but not limited to, regular hearing examinations, ear protection, hearing aids, and hearing aid supplies.

ORDER

Accordingly, it is hereby ORDERED that:

1. Employer, Virginia International Terminals, shall pay to Claimant, Richard Nunnally, permanent partial disability benefits in the amount of $4,506.15 in accordance with Section 8(c)(13)(B) of the Act (2.5% impairment X 200 weeks X $901.23 stipulated compensation rate).

2. Employer shall receive credit for any compensation already paid.

3. Interest at the rate specified in 28 U.S.C. § 1961 in effect when this Decision and Order is filed with the District Director shall be paid on all accrued benefits computed from the date each payment was originally due to be paid.

4. All computations are subject to verification by the District Director.

5. Pursuant to Section 7 of the Act, Employer shall provide such medical treatment as the nature of Claimant's work-related disability requires.

6. Claimant's attorney, with thirty (30) days of the receipt of this Decision and Order, shall submit a fully supported fee petition, a copy of which shall be sent to opposing counsel, who then shall have twenty (20) days to respond with objections thereto.

A
Daniel A. Sarno, Jr.
Administrative Law Judge

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